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No. 96-1475

Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RUI TAVORA,

Petitioner,

—against—

NEW YORK MERCANTILE EXCHANGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent New York Mercantile Exchange ["NYMEX"] respectfully submits that a writ of certiorari should not issue in this case. The decision below is not in conflict with the decisions of this Court. There is no conflict between the Circuits; indeed, all seven Circuits that have ruled on the issue presented have reached the same result. The decision below also comports with common sense; and it would be inappropriate and imprudent for the Court to legislate the new absolutist rule proposed by Petitioner.

STATEMENT OF THE CASE

Petitioner's brief correctly states the factual and procedural background of the case: *viz*, that he sues to overturn the adverse decisions against him (by the United States Court of Appeals for the Second Circuit, the United States District Court for the Southern District of New York and the Equal Employment Opportunity Commission) that NYMEX did not violate Title VII when it discharged Petitioner for failing to comply with NYMEX's policy regarding the permissible length of hair of its employees [A.3-6, 7-8 and 16-21]. The proffered basis for Petitioner's claim is that female employees of NYMEX are not required to have the same hair length as male employees [A. 11], which he says renders NYMEX's policy a violation of Title VII.

Petitioner does not contend that NYMEX instituted its hair-length policy in order to apply it against him personally, or that NYMEX enforced the policy against only him or differently as to other male employees [cf. A. 10-11]. Nor does Petitioner allege that NYMEX had any discriminatory or other wrongful intention in firing him, or that its policy is unreasonable—*i.e.*, except that it is allegedly discriminatory [*id.*].

I.

UNANIMOUS AUTHORITY HOLDS THAT HAIR LENGTH POLICIES ARE NOT WITHIN TITLE VII

This case presents a narrow issue: *viz*, whether an employer can prescribe different acceptable hair lengths for its male employees than those for female employees. Every court which has previously addressed this issue (including the Court of Appeals and the District Court in this case), both before and after the decisions of this Court cited by Petitioner, has answered "yes". *Longo* v. *Carlisle DeCoppet & Co.*, 537 F. 2d 685 (2d Cir. 1976) ("requiring short hair on men and not on women does not violate Title VII"); *Barker* v. *Taft Broadcast Co.*, 549 F.2d 400 (6th Cir. 1977); *Earwood* v. *Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976); *Knott* v. *Missouri Pacific RR*, 527 F.2d 1249 (8th Cir. 1975); *Baker* v. *California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046, 95 S. Ct. 2664, 45 L. Ed. 2d 699 (1976); *Willingham v. Macon Telegraph Pub. Co.*, 507 F. 2d 1084, 1091 (5th Cir. 1975) (en banc); *Fagan* v. *National Cash Register Co.*, 481 F.2d 1115, 1125 (D.C.Cir. 1973); *Seitz* v. *O'Connor*, 1995 WL 745012, *2 (E.D.N.Y. 1995). See also: *Rogers* v. *American Airlines, Inc.*, 527 F.Supp. 229, 231 (S.D.N.Y. 1981) ("even if the grooming policy imposed different standards for men and women, . . . it would not violate Title VII"); *Bertulli* v. *First Nat. Stores*, 20 Fair Empl. Prac. Cases (BNA) 1527 (D.Mass 1979); Mack, *Employment Discrimination Law* §5.41 at 388 (1988).[1]

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[1] Indeed, settled authority also holds that hair grooming policies of other types also do not violate the law. Thus, in *Rogers*, *supra* (527 F. Supp. at 231), the Court held that a hair grooming policy which prohibited females from wearing an all-braided hair style was not discriminatory, either as to women or as to Afro-American persons who wish to wear their hair in the "cornrow" style. Accord: *McBride* v. *Lawstaf, Inc.*, U.S. Dist. LEXIS 16190, *6-7, 1996 U.S. Dist. LEXIS 16188 (N.D. Ga.

Some of these decisions have reasoned that such a difference is not discrimination within the ambit intended by Congress for Title VII because it is too insignificant in nature and effect. Some have reasoned or added that such a policy does not offend Title VII because it addresses differences between the sexes that are not immutable or tied to immutable aspects of gender such as different biological characteristics. Several have reasoned in this regard, or added, that such a policy is not unreasonable and is so easily complied with that it would offend common sense to rule the policy illegal, particularly on an across-the-board basis. All are correct, as the Court of Appeals in this case concluded [A. 5].

The Court (we respectfully submit) should decline Petitioner's invitation to go beyond the narrow length-of-hair issue presented here and to wade into the quicksand of attempting to decree an absolute rule for every conceivable employer-employee policy. There is no need or warrant for such dangerous judicial legislation, particularly in the context of this case.[2]

Petitioner himself asks this Court for a "common sense" approach to this issue, correctly cautioning that "common sense should never be left at the door" [Petition at 11]. Yet,

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1996) ("grooming policy prohibiting a braided hair style is not 'unlawful employment practice' as defined by 42 U.S.C. § 2000e-2").

[2] If such a rule is to be decreed (and NYMEX respectfully contends it should not), it should be decreed by Congress, not the courts. Petitioner's suggestion that society's mores and attitudes have changed during the past ten or fifteen years is a sociological argument which should be addressed to the legislature. Contrary to his contention, those courts which have outlawed other dress or appearance differences in recent years have not based their decisions on such a consideration, but rather on the undeniably offensive and substantively discriminatory nature of the policies which were at issue in those cases, e.g. making women wear sexually provocative attire, *etc.* Indeed, those courts cautioned against the absolutist rule that Petitioner seeks, and concentrated instead on the particular employment policies before them. See, e.g., *Batson* v. *Powell*, 912 F. Supp. 565, 572 (D.D.C. 1996).

the automatic rule which Petitioner proposes would do just that. The courts cannot possibly envision every conceivable employment situation in which differences between the sexes may become an issue; and our common sense should tell us not to try. For example, does it really discriminate, and (if so) in a manner we wish to outlaw (with serious monetary penalties), for an employer to provide different lavatory facilities for men and women? For an employer to prohibit men from wearing lipstick or mini-skirts? To allow a beach club to require different bathing suits for male and female lifeguards?[3] *Etc.*, *etc.* Should the courts pre-decide all such potential fact-specific issues on a global basis?

This Court has not decreed an absolute rule; and the lower court decisions since the decisions of this Court which Petitioner cites so recognize. Petitioner would have the Court take out of context parts of sentences or other remarks in those opinions to support his argument that the Court did establish an absolute rule in them. NYMEX does not believe that they even say what Petitioner contends; but, such statements must be read as part of the full discussion and the factual context in which they were made. See, e.g., *Landgraf* v. *USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229, 252 (1994); *Bramwell* v. *U.S. Fidelity & G.Co.*, 269 U.S. 483, 489, 46 S.Ct. 176, 70 L.Ed. 368 (1925); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 399, 5 L.Ed. 257 (1821); *U.S.* v. *Brown*, 79 F. 3d 1550, 1556 n.11 (11th Cir. 1996); *In re Grand Jury Subpoena Duces Tecum*, 1 F.3d 87, 92-93 (2d Cir. 1993), *cert. denied*, 510 U.S. 1091, 114 S.Ct. 920, 127 L.Ed. 2d 214 (1994).

Each of the decisions cited by Petitioner involved an alleged discrimination of consequence, whose effect was to treat one sex in an unequal manner because of the biological differences between men and women. That is the rationale of

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[3] See, e.g., *Dodge* v. *Giant Food, Inc.*, 488 F.2d 1333, 1336-37 (D.C. Cir. 1973).

the "immutable" characteristics distinction fixed by some courts, and of the conclusion that some differences simply do not fall within the statute. Whether the words have expressed the logic perfectly, or frankly can do so, the common sense of the result and of an approach which evaluates each different policy on an individual basis is clear.

Petitioner has also incorrectly exaggerated the effect of the other hair-length cases, excessively contending that, "under the reasoning of these decisions, terminations on the basis of gender may not be covered by Title VII" and "sexual harassment may not be covered" [Petition at 13]. Those decisions have not had any such effect. Rather, true gender discrimination and sexual harassment have been repeatedly and unhesitatingly outlawed since and notwithstanding the hair-length decisions. Indeed, no case of which we are aware has suggested that the hair-length decisions have such a meaning or have had such an effect.[4]

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH CURRENT DECISIONS OF THIS COURT

Petitioner incorrectly contends that decisions of this Court since the early hair-length cases (i.e., the mid-1970's) have changed the law, creating an absolutist rule that an employer can make no distinction between and men and women which has any effect whatever on an employee's rights and benefits. NYMEX respectfully submits that Petitioner is in error, and

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[4] *Tamini* v. *Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987), cited by Petitioner, does not so state and, in any event, is distinguishable. The court there specifically declined to rule that any policy requiring female employees to wear make-up is or would be illegal (see p. 1554); rather, the policy there was found violative because it was "implemented with plaintiff in mind" (*id.*), and "for pretextual purposes. . . directed at plaintiff" (p. 1555). Admittedly, no such situation is presented here.

(as the Court of Appeals at bar correctly concluded) has "fail[ed] to consider the factual context" and actual holdings of those cases [A.6].

As noted above, this Court and the Courts of Appeal have frequently cautioned that it is improper to simply lift a sentence out of a judicial opinion and suggest that it is declarative of an absolutist rule of law. As Chief Justice Marshall explained, long ago, in *Cohens*, *supra* (19 U.S. at 399):

> "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. . . ."

Accord: *Landgraf*, *supra* (128 L. Ed. at 252); *Bramwell*, *supra* (269 U.S. at 489); *Brown*, *supra* (79 F. 3d at 1556 n. 11); *In re Grand Jury*, *supra* (1 F. 3d at 92-93).

Thus, while it is true that language in some of this Court's decisions states that Title VII covers "the entire spectrum of disparate treatment of men and women" by employers and outlaws employment policies based only on gender [cf. Petition at 6 and 9], those pronouncements must be read in context, and the factual circumstances in which they were made can not be ignored.

Petitioner incorrectly contends [Petition at 11] that the decisions at bar and the unanimous line of authority regarding hair-length "do not reflect or take into account the changes in the law since the *Gilbert* decision", i.e., *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L. Ed. 2d. 343 (1976). Petitioner traces that supposed change in the law to *Newport News Shipbuilding & Dry Dock Co.*, v. *EEOC*, 462 U.S. 669, 681-82, 103 S.Ct. 2622, 77 L. Ed. 2d 89 (1983), which he says signaled an adoption by this Court of the absolutist rule he proposes. More specifically, Petitioner

relies upon a sentence in *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L. Ed. 2d 657 (1978), to argue that Title XII outlaws any employment policy which includes "treatment of a person in a manner which but for that person's sex would be different" [Petition at 9].

The Court of Appeals at bar correctly rejected that argument, since it misinterprets *Newport News*, *Manhart* and the other cases cited by Petitioner [A.5-6].

Newport News did not state that any employment policy which draws *any* difference between men and women, regardless of its nature, violates Title VII. Rather, the Court directed itself to the specific policy at issue there, i.e., whether an employer could provide different pregnancy health care coverage for female employees as opposed to the spouses of male employees. The Court found that such direct and serious discrimination between male and female employees violates the Pregnancy Discrimination Act, which had specifically overruled both the Court's prior decision in *Gilbert*, 429 U.S. 125, as to pregnancy policies and the "reasoning" of that decision (see 462 U.S. at 684).

The "reasoning" to which the Court referred in *Newport News*, however, was *not* (as Petitioner contends) "analogous to the reasoning" of the hair-length cases [cf. Petition at 7]. Rather, *Gilbert* had reasoned that "an exclusion based on pregnancy is not a gender-based discrimination at all" (429 U.S. at 136), and that pregnancy was not within Title VII because it supposedly is not a "disease or disability" (*id.*). Congress disagreed, and determined (in enacting the Pregnancy Discrimination Act) that pregnancy *is* a condition as to which Title VII should apply and does apply. If there is to be such a broad-sweeping change in the law as to the issue presented here (which NYMEX respectfully submits should not occur), it too should be made by Congress, not the courts.

Newport News did not say, as Petitioner suggests, that there can be no difference whatever in the treatment of men and

women; and the cases since *Newport News* have not construed it as so decreeing. Indeed, those cases hold the opposite, and continue to endorse the reasoning of the hair-length cases. Thus, the court explained in *Craft* v. *Metromedia, Inc.*, 572 F.Supp. 868, 877 (W.D.Mo. 1983), *aff'd on relevant ground and mod. on other grounds*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed 2d 592 (1986):

> "To the extent that plaintiff might argue that Title VII absolutely prohibits an employer from imposing reasonable but different standards of appearance for males and females, such a position must be rejected as contrary to the overwhelming weight of authority. Title VII 'was never intended to interfere with the promulgation and enforcement of personal appearance regulations by private employers' [citations omitted]. 'A private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees, and such does not constitute an unfair employment practice . . .' [citations omitted]".

Accord: *Arnett* v. *Aspin*, 846 F.Supp. 1234, 1239-40 (E.D.Pa. 1994) ("employment policies which prohibit long hair on men but not on women . . . have been upheld against Title VII challenges"); *McBride, supra* (1996 U.S. Dist. LEXIS 16190 at *6-7) (same); *Cairo* v. *OH Material Corp.*, 710 F.Supp. 1069, 1071(M.D.La. 1989) ("Title VII was never intended to encompass sex classifications having only an insignificant effect on employment opportunities").

Petitioner has cited no case which has adopted his characterization of *Newport News* or its supposed effect on Title VII; and the post-*Newport News* decisions of this Court do not adopt Petitioner's view. For example, in *Auto. Workers* v. *Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196, 113 L. Ed. 2d 158 (1991), the Court addressed only the employment policy at issue there, which barred employment of women in cer-

tain jobs because they would be exposed to lead and its detrimental effects on fertility. That policy was illegal because it was undeniably premised on the biological differences between men and women:

> "Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone . . . Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing."

(499 U.S. at 198). Moreover, such a policy plainly violated the Pregnancy Discrimination Act, which bars discrimination predicated on the fact that only women (not men) get pregnant (*id.*)—and *Auto. Workers* cited *Newport News* only to that extent (at p. 199).

We are not aware of any case which has held that the language of *City of Los Angeles Dept. of W.& P.* v. *Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L. Ed 2d 657 (1978), which is cited in *Newport News* and relied on by Petitioner (i.e., the so-called "simple test" of "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different'") [Petition at 9] literally outlaws *any* policy with *any* difference between the sexes. Rather, that language has always been, and (NYMEX respectfully submits) must be, read in its context in *Manhart*, and in the context of the cases which have cited it.

Manhart condemned an employment policy that disfavored women only because they were women. Moreover, *Manhart* was decided *before* the Pregnancy Discrimination Act, and thus also does not represent a change in the law *because* of the enactment of the statute. The post-*Manhart* cases have not rejected the hair-length cases, much less those which were decided before *Manhart* or *Newport News*. Rather, recent cases continue to cite and rely upon the hair-length cases. See, e.g., *Seitz*, *supra* (1995 WL 745012 at *2); *Arnett*, *supra* (846 F.Supp. at 1239-40); *Cairo*, *supra* (710 F.Supp. at 1071);

Devine v. *Lonschein*, 621 F.Supp. 894, 896-97 (S.D.N.Y. 1985), *aff'd*, 800 F.2d 1127 (2d Cir. 1986).

The other decisions of this Court which Petitioner cites also do not pronounce or endorse the absolutist rule that he proposes, and are also factually distinguishable.

The issue in *Harris* v. *Forklift*, 510 U.S.17, 114 S.Ct. 367, 126 L. Ed 2d 295 (1993), was whether a female employee must show that she suffered adverse psychological effects to recover for sexual harassment. The Court's remark that the statute addresses "the entire spectrum of disparate treatment of men and women in employment" (510 U.S. at 21) was part of a discussion of when "a discriminatorily hostile or abusive environment" falls within Title VII, not whether any difference (as between men and women) whatsoever in an employment policy necessarily constitutes actionable discrimination.

Price Waterhouse v. *Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed. 2d 268 (1989), where the Court called for the application of common sense (at p. 241), addressed the burden of proof in a Title VII action. There was direct evidence that the plaintiff had been denied a partnership in the defendant accounting firm *because* she was a woman (at pp. 235-36). The Court pointed out that Title VII was enacted to prevent such a decision expressly based on one's gender; but it also cautioned:

> "Yet the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions." (emphasis in original).

(at p. 239). Indeed, the Court endorsed a "balance between employee rights and employer prerogatives" (*id.*); and it explained, after the remarks quoted by Petitioner, that "the other important aspect of the statute is its preservation of an employer's freedom of choice" (at p. 242). That (NYMEX respectfully submits) is the antithesis of the kind of absolutist rule advocated by Petitioner here.

In *Hishon* v. *King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L. Ed. 2d 59 (1984), the Court was also dealing with a decision not to make a woman a partner in a firm and to terminate her employment *because* she was a woman. The specific issues before the Court were whether a decision to invite one into a law partnership is a condition or term of employment and whether partnerships are exempt from the definition of an "employer" under the statute. The Court did not confront or pass on the contentions proffered by Petitioner at bar.

* * *

In sum, Petitioner's pronouncement that the law has changed is incorrect. What is really involved here is that Petitioner *wants* the law to change. Such a request, however, should be addressed to Congress—particularly where it would have the kind of far-reaching and disruptive societal consequences which his proposed rule would have. NYMEX respectfully submits that such an across-the-board rule-change is neither warranted nor advisable, and surely not in the context of an employer's policy which merely prescribes hair-length.

NYMEX's hair-length policy has no linkage to the biological or other immutable characteristics of one's sex; and it admittedly is not sexually offensive. It addresses a legitimate interest of an employer to maintain decorum and require a certain appearance in its workplace. The policy can readily be complied with, without offense to one's gender, by anyone who wishes to work for this employer. That is simply *not* what Congress meant to cover when it outlawed gender discrimination, or what the Court has referred to in its remarks about policies which do constitute gender discrimination.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Dated: April 15, 1997

Respectfully submitted,

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